MINUTES

COMMISSION ON STATE MANDATES

State Capitol, Room 447
Sacramento, California
March 26, 2010

Present: Member Cynthia Bryant, Chairperson
Representative of the Director of the Department of Finance
Member Francisco Lujano, Vice Chairperson
Representative of the State Treasurer
Member Richard Chivaro
Representative of the State Controller
Member Cathleen Cox
Acting Director of the Office of Planning and Research
Member Sarah Olsen
Public Member
Member J. Steven Worthley
County Supervisor
Member Paul Glaab
City Council Member

CALL TO ORDER AND ROLL CALL

Chairperson Bryant called the meeting to order at 9:40 a.m. Executive Director Paula Higashi called the roll.

APPROVAL OF MINUTES

Item 1 January 29, 2010

The January 29, 2010 hearing minutes were adopted by a vote of 7-0.

APPEAL OF EXECUTIVE DIRECTOR DECISIONS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 1181, SUBDIVISION (c)

Item 2 Staff Report (if necessary)

There were no appeals to consider.

PROPOSED CONSENT CALENDAR

HEARINGS AND DECISIONS ON TEST CLAIMS AND STATEMENT OF DECISIONS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (GOV. CODE, § 17551) (action)

DISMISSAL OF WITHDRAWN PORTIONS OF TEST CLAIM

Item 9* *School Accountability Report Cards IV*, 01-TC-22A
Education Code Section 52056, subdivision (b).
Statutes 1999-2000x1 (SB 1X), Chapter 3, Statutes 2000, Chapter 695 (SB 1552)
San Juan Unified School District, Claimant

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

PROPOSED AMENDMENTS TO PARAMETERS AND GUIDELINES
STATE CONTROLLER'S OFFICE REQUEST TO UPDATE BOILERPLATE LANGUAGE

Item 11* SCHOOL DISTRICT PROGRAMS

A. *Caregiver Affidavits,* 05-PGA-46
Education Code Section 48204, Subdivision (d)
Family Code Sections 6550 and 6552
Statutes 1994, Chapter 98 (SB 592)

B. *County Office of Education; Fiscal Accountability Reporting,* 05-PGA-47
Education Code Sections 1240, subdivision (j), 1240.2, 1620, 1622, 1625, 1628, and 1630
Statutes 1987, Chapters 917 (AB 93) and 1452 (SB 998); Statutes 1988, Chapters 1461 (AB 3403) and 1462 (SB 1677); Statutes 1990, Chapter 1372 (SB 1854); Statutes 1991, Chapter 1213 (AB 1200); Statutes 1992, Chapter 323 (AB 2506); Statutes 1993, Chapters 923 (AB 2185) and 924 (AB 1708); Statutes 1994, Chapters 650 (AB 3141) and 1002 (AB 3627); Statutes 1995, Chapter 525 (AB 438)

C. *Financial Compliance Audits,* 05-PGA-49
Education Code Sections 1040, 14501, 14502, 14503, 14504, 14505, 14506, 14507, 41020, 41020.2, 41202.3, and 41023
Statutes 1977, Chapters 36 (AB 447) and 936 (SB 787); Statutes 1978, Chapter 207 (SB 1511); Statutes 1980, Chapter 1329 (AB 3269); Statutes 1984, Chapter 268 (SB 1379);Statutes 1985, Chapters 741 (AB 1366) and 1239 (AB 514); Statutes 1986, Chapter 1150 (AB 2861) Statutes 1988, Chapter 1351 (AB 3417), Chapters 1461 (AB 3403) and 1462 (SB 1677); Statutes 1992, Chapter 962 (SB 1996); Statutes 1994, Chapter 20 (SB 858) and 1002 (AB 3627); Statutes 1995, Chapter 476 (SB 125)
State Controller's Office Standards and Procedures for Audits of California K-12 Local Educational Agencies

D. *Graduation Requirements,* 05-PGA-50
Education Code Section 51225.3
Statutes 1983, Chapter 498 (SB 813)

E. *Law Enforcement Agency Notifications,* 05-PGA-55
Education Code Section 48902, Subdivision (c)
Statutes 1989, Chapter 1117 (SB 1275)

F. *Pupil Suspensions: Parent Classroom Visits,* 05-PGA-58
Education Code Section 48900.1
Chapter 1284, Statutes of 1988 (AB 3535)

G. *Physical Education Reports,* 05-PGA-60
Education Code Sections 51223.1
Statutes 1997, Chapters 640 (AB 727)

H. *Physical Performance Tests,* 05-PGA-61
Education Code Section 60800
Chapter 975, Statutes of 1995 (AB 265)
California Department of Education Memorandum,
Dated February 16, 1996

I. *Pupil Classroom Suspension: Counseling,* 05-PGA-62
Education Code Section 48910, Subdivision (a)
Chapter 965, Statutes of 1977 (AB 530); Chapter 498, Statutes of 1983 (SB 813)

J. *Pupil Health Screenings,* 05-PGA-63
Health and Safety Code Sections 324.2 (now 124100) and 324.3 (now 124105)
Statutes 1976, Chapter 1208 (AB 4284); Statutes 1991, Chapter 373 (AB 52); Statutes 1992, Chapter 759 (AB 1248)

K. *Pupil Residency Verification and Appeals,* 05-PGA-64
Education Code Sections 48204.5 and 48204.6
Revenue and Taxation Code Section 97.3
Section 5 of Statutes 1995, Chapter 309 (AB 687)

L. *Removal of Chemicals,* 05-PGA-66
Education Code Section 49411
Statutes 1984, Chapter 1107 (AB 3820)
As Amended by Statutes 1994, Chapter 840 (AB 3562)
Department of Education Guidelines

M. *School District Fiscal Accountability Reporting,* 05-PGA-67
Education Code Sections 42100, 42127, 42127.5, 42127.6, 42128, 42131
Government Code Section 3540.2
Statutes 1981, Chapter 100 (AB 777); Statutes 1985, Chapter 185 (AB 367); Statutes 1986, Chapter 1150 (AB 2861); Statutes 1987, Chapters 917 (AB 93) and 1452 (AB 998); Statutes 1988, Chapters 1461 (AB 3403) and 1462 (SB 1677); Statutes 1990, Chapter 525 (SB 1909); Statutes 1991, Chapter 1213(AB 1200); Statutes 1992, Chapter 323 (AB 2506); Statutes 1993, Chapters 923 (AB 2185) and 924 (AB 1708); Statutes 1994, Chapters 650 (AB 3141) and 1002 (AB 3627); Statutes 1995, Chapter 525 (AB 438)

N. *Law Enforcement College Jurisdiction Agreement,* 05-PGA-70
Education Code Section 67381
Statutes of 1998, Chapter 284 (SB 1729)

O. *Health Benefits for Survivors of Peace Officers and Firefighters,* 05-PGA-55
Labor Code Section 4856, Government Code Section 21635
Statutes 1996, Chapter 1120 (AB 3748); Statutes 1997, Chapter 193 (SB 563)

Member Chivaro made a motion to adopt items 9 and 11 on the consent calendar. With a second by Member Glaab, the consent calendar was adopted by a vote of 7-0.

Paula Higashi, Executive Director, noted that Items 3 and 4 have been removed from the agenda because they were withdrawn by the claimant, Los Angeles Unified School District.

HEARING AND DECISIONS ON TEST CLAIMS AND STATEMENTS OF DECISION, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (Gov. Code, § 17551) (action)

Ms. Higashi swore in parties and witnesses participating in the hearing.

TEST CLAIMS

Item 5 *Discharge of Stormwater Runoff, Order No. R9-2007-000,* 07-TC-09
California Regional Water Quality Control Board, San Diego Region
Order No. R9-2007-001, NPDES No. CAS0108758
Parts D.1.d.(7)-(8), D.1.g., D.3.a.(3), D.3.a.(5), D.5, E.2.f, E.2.g, F.1, F.2, F.3, I.1, I.2, I.5, J.3.a.(3)(c)iv-viii & x-xv, and L;
County of San Diego, Cites of Carlsbad, Del Mar, Imperial Beach, Lemon Grove, Poway, San Marcos, Santee, Solana Beach, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, San Diego, Vista, Claimants

Eric Feller, Senior Commission Counsel presented this item stating that the claimants allege various activities for reducing stormwater pollution in compliance with a permit issued by the California Regional Water Quality Control Board, San Diego Region. A primary issue in dispute is whether the permit activities in the test claim constitute a federal mandate on local agencies under the Clean Water Act. Staff finds that the activities in the permit are not mandated by federal law.

Another issue in dispute is whether the claimants have fee authority for the various activities in the permit. Staff finds that the claimants do not have the authority within the meaning of Government Code 17556 because of the election requirement in Proposition 218, except for the hydromodification plan (HMP) and the low-impact development (LID) activities.

Staff recommended the test claim be partially approved for the activities listed in the analysis, and that any fees or assessments imposed after a Proposition 218 election, or in the absence of a Proposition 218 protest, be recognized as offsetting revenue.

Parties were represented as follows: Timothy Barry and Jon Van Rhyn representing the County of San Diego; Shawn D. Hagerty, Helen Holmes Peak and James P. Lough representing the 21 claimant cities; Elizabeth Miller Jennings representing the State Water Resources Control Board; and Susan Geanacou and Carla Shelton representing the Department of Finance.

Timothy Barry, with the County of San Diego, addressed the staff's recommendation regarding fee authority for HMP and the LID, asserting that a regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purpose and provisions of a regulation. The fees must not exceed the reasonable costs of providing services, and may not be levied for an unrelated revenue purpose. Mr. Barry indicated that while claimants agree that the co-permittees have authority to assess fees to developers who bring in their priority development projects for approval, their authority to assess a regulatory fee is not so broad as to include the costs incurred, and will incur, in developing and implementing these programs. There is not a sufficient nexus between the future projects that may come in to any co-permittee office for approval and the appropriate fee.

Mr. Barry reviewed the two cases relied upon by staff in their analysis: *The California Association of Professors, Professional Scientists* v. *The Department of Fish and Game*, and *Sinclair Paints;* pointing out that all of the activities that are referred to in these cases are activities that are performed subsequent to the development and implementation of the program that constitutes the regulation.

Mr. Barry explained the fees that the co-permittees are seeking reimbursement for in this case are costs that were incurred by the co-permittees in developing the original HMP and LID plan. Co-permittees retained a consultant and had expended in excess of a million dollars towards the development of this HMP. With respect to those development costs, there is not a sufficient nexus to any particular project to which the fees could attach, and it would be speculative to determine what would be an appropriate and reasonable fee that could be assessed against projects that would come forward in the future.

Mr. Barry also disagreed with staff that the HMP and LID cost are not reimbursable because construction of municipal projects is not mandated. Constructing public improvements that provide services to the public are core services that government is expected to provide. As such, the development of municipal projects is not discretionary.

Elizabeth Miller Jennings with the State Water Board stated the she is aware that the Commission upheld the staff recommendation in the Los Angeles stormwater permit, but argued that this proposed decision takes that determination to an extreme and illogical conclusion.

Ms. Jennings asserted that even the most basic activities the cities have always performed, such as street sweeping and cleaning their own storm drainage, have now been deemed to be reimbursable state mandates.

After reviewing the history of NPDES permits, she stated that federal law specifically requires municipal and industrial dischargers to obtain these stormwater permits. As required by federal law, the San Diego Water Board began issuing NPDES permits to the city and counties in San Diego who discharge stormwater with pollutants to the San Diego Bay. Federal law requires this most recent permit issued in 2007. Its terms do not exceed minimum federal requirements.

Ms. Jennings stated that the obligation to obtain this permit is placed directly on local agencies, and not the state. The Regional Water Board has done no more than comply with federal law in issuing the permit. Local agencies have the opportunity to assess fees to pay for the cost to comply with the permit. Federal law states that the permit must include programs and requirements to ensure that the permittees reduce pollutants in their stormwater to the maximum extent practicable (MEP). The federal regulations that have been adopted for this program only tell what must be included in the permit application.

Ms. Jennings clarified that the Ninth Circuit Court of Appeal stated that U.S. EPA or the state that is issuing the specific permit must design the controls that are in the actual permit. In this case, Commission staff looked at these application regulations and basically said that any words that are not specifically found in the regulations must be a state mandate that goes beyond federal mandates. The court, in the *Rancho Cucamonga* case, held specifically that the federal law, however, requires the Regional Board to specify the detailed programs in its permits. While it is conceivable that a permit issued by a regional board could exceed the minimum federal requirements, that did not happen here. Numerous courts have upheld these very same provisions as reflecting MEP and no more.

Ms. Jennings reported that the State Water Board does concede that this permit is more detailed than the prior permit. But again, federal law requires improvements in subsequent permits to achieve MEP.

According to Ms. Jennings, it is not appropriate to compare the permit to others. Federal law requires that MEP be assessed for each specific locality, and requires municipalities that discharge stormwater containing pollutants to obtain NPDES permits. It is the operator of the municipal stormwater system that must obtain the permit.

Ms. Jennings also pointed out that the permit is not unique to local government. The requirement to obtain NPDES permits for stormwater discharges applies to municipalities and to industrial facilities that discharge stormwaters. This permit looks a little different than industrial permits because: (1) each permit must specify the specific activities that are required; and (2) the activities for a municipal stormwater system are somewhat different than a construction site. The permits that are issued to industrial and construction have more stringent requirements than municipal permits under federal law.

Ms. Jennings added that the local agencies do have the ability to pay for the activities, stating appreciation for staff's findings that fees and assessments that are actually collected are not subject to reimbursement. But where local agencies have the authority to make assessments, the amount should not become reimbursable simply because state law sets hurdles for assessment. The analysis by staff appears to mean that if a local agency made no effort whatsoever to collect any fees, they could simply turn to the state for reimbursement.

Carla Shelton, Department of Finance, stated that Finance is in general support of the Water Board's comments and Finance's comments are noted on record.

Chairperson Bryant asked for a staff response.

Mr. Feller responded that the issue is whether or not local agencies have fee authority. State law does not require the local agencies to make a good-faith effort to impose a fee. Regarding Proposition 218, if the vote fails, the local agency has no fee authority to impose for these programs. In the absence of fee authority, there are reimbursable mandated costs.

Mr. Feller responded to the argument that the permits are not unique to local government by stating that all the Commission has jurisdiction over is this San Diego permit, which does not apply to private entities.

Regarding federal requirements, in each case, staff found that the permit was more specific than federal law. Mr. Feller pointed out that both federal and state statutes authorize the state to impose more stringent requirements on the local agencies for stormwater purposes.

Chairperson Bryant stated that, in the State Water Code, the Water Board is directed to only go as far as federal law allows them.

Mr. Feller read Water Code section 13377 from the staff analysis, which allows the state to impose more stringent requirements than the federal requirements and is consistent with federal law.

Chairperson Bryant referred to Water Code section 13374, which says that California's wastewater discharges requirements are equivalent to federal requirements. Therefore, the threshold question is whether this permit includes more than federal law requires.

Shawn Hagerty, representing the claimant cities, responded that "waste discharge requirements are equivalent to NPDES permits." The language that staff cited clearly gives the state authority to go beyond federal requirements. The Los Angeles test claim is a good example of where the state went beyond federal regulations. Mr. Hagerty cited the *Burbank* case where the state law actually preceded the federal requirements by three years so the state had a very robust and

expansive system in place which was more stringent and allowed the state to regulate more than under federal law.

Mr. Hagerty stated that clearly a portion of the permit goes beyond federal law, and cited an analysis done by the San Diego Regional Board in 2001, showing there was a 60/40 split.

Chairperson Bryant stated that if the federal requirement is to achieve improved stormwater discharge to the maximum extent practical than there is a federal permit under federal law.

Mr. Hagerty responded that there are standards and goals. The federal law has very specific requirements of what needs to be in the permits. The standards imposed in those permits well exceed those requirements.

Camille Shelton, Commission Chief Legal Counsel, explained the difference in analyzing a federal-mandated versus a state-mandated program. Case law says that if the state is directing and has taken control of the program and has independently directed particular activities, those activities are, in fact, mandated by the state and not the federal government. The key example is the *Long Beach Unified School District* case, where federal law required school districts to have a desegregation plan but gave the state choices on how to comply. The state had specific activities in their own plan and directed the school districts. The argument went up on appeal and the state said it was a federal mandate. The court said it was not because the control and the activities were directed and mandated by the state, not the federal government.

Ms. Jennings disagreed that the *Long Beach* case applies because the question is MEP. While it is possible that a regional board could go beyond MEP, they have not. Federal law requires the Board to specify the practices, but the practices do not go beyond federal law. Ms. Jennings explained that staff's reference to the analysis done by the San Diego Regional Board in 2001 was by a non-lawyer, a low-level staff person. Subsequently, the court of appeals decided that the permit did not exceed MEP at all.

Chairperson Bryant stated that MEP would vary from place to place.

Ms. Shelton clarified that the state could have done a number of different things in San Diego County. Again, the courts have said that is a state mandate and not a federal mandate when the state has options.

Mr. Feller explained that the comparison to the *Long Beach* case works because the federal government set out the goal and it was up to the state to figure out how to reach the goal. That is where the more specific state mandates came in.

Member Glaab asked staff whether the claimants have authority sufficient to add fees. If they do not have fee authority, then it would be eligible for full reimbursement.

Mr. Feller stated that regulatory fees could apply to the entire permit, potentially, if it were not for the Proposition 218 election requirement. That threshold negates most of the fee authority that the local governments have. The only ones found to be exempt from Proposition 218 were fees imposed for property development purposes. Because HMP and LID plans are so closely tied to priority development projects in the permit, local governments have fee authority that is not subject to Proposition 218 elections.

Member Glaab asked if they have the authority to assess the fee, then does the Commission just deem it as not reimbursable. Mr. Feller stated that they could put the fee out to the voters. It could be any part or all of the permit activities. If the fee were enacted as a result of the election, they would have fee authority that would be considered an offset under the permit. However, the

election requirement negates their fee authority under 17556, because some local agencies might never win voter approval for the fees.

Ms. Shelton stated that under Government Code Section 17556, the Commission is directed to not find costs mandated by the state if the local entity has fee authority sufficient to pay for the costs of the mandated activity. Often, the Commission finds that there is fee authority but it is not sufficient to cover the cost of the mandate. The Commission does not deny the claim, but rather lists that fee revenue as offsetting revenue in the parameters and guidelines. Here, by law, there is fee authority for everything. If the local entity puts the fee forward, it has to go to a vote of the people. They do not control whether that fee passes. If the voters agree with the fee, the local agency may ultimately have no costs. There is no evidence in the record that the fee has been put to a vote. And Government Code section 17556 (d) is not applicable because the local entity does not have control over the fee.

Member Worthley summarized the claimant's position as having fee authority but nobody to charge that fee to because nobody is coming forward with a project. Ms. Shelton clarified that argument is related only to the HMP and LID activities because the fee authority does not have to go to a vote.

Member Worthley asked if the Commission needs to also decide who the fee can be charged to in order for 17556 (d) to apply. From a practical standpoint, fee authority is of no value because there is nobody to charge. Mr. Feller described the HMP and LID permit requirements and the priority development projects and stated that any developer with projects in any of those categories could be charged not only a regulatory fee but also a developer fee under the Mitigation Fee Act. Therefore, staff found that there was that nexus to charge the fee to develop the HMP and LID.

Ms. Shelton referred to the *Connell* case to clarify the argument of whether something is sufficient. The claimant in that case said it was not economically feasible to charge a fee and therefore it was not sufficient. The court, however, said that they did have the authority and under the law it is sufficient.

Mr. Barry added that a regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purpose of a regulation. The co-permittees have expended over a million dollars to develop an HMP that is required by the permit. Once it is approved by the regional board, it presumably will be adopted as ordinances in the co-permittees' administrative codes. The costs incurred to develop the plan are not incurred to carry out a program where applicants can be assessed a fee for getting their developments approved. The difference is whether the regulatory authority to assess a fee is so broad as to include the development and implementation of the initial HMP.

And, according to Mr. Barry, it is speculation as to whether a developer will come in with a priority development plan and how many, how often and how big will those projects be. The co-permittees are without any rational basis for determining how to spread the million dollar cost against priority development projects that may come in the door sometime in the future.

Mr. Feller stated that staff's position is that the authority is broad enough to cover administration as well as the development and implementation of the HMP.

Member Olsen stated that, in the implementation of any program, there is the planning phase. There has to be a way to estimate how to spread the fee for the development of the program over a period of time to recover costs.

Member Worthley offered an example of how Tulare County spent a substantial amount of money developing a general plan. That was an expense that the County had to incur to create a plan that will impact projects in the future, but cannot be charged back against projects in the future. They can, however, charge applicants for the processing of building permits as they relate to the general plan. Member Worthley suggested some kind of analysis based on the history and projections of the plan to estimate the costs.

As to the state's argument that the permit is not a "program," Mr. Feller said that, in *County of Los Angeles* v *Commission on State Mandates*, the court found that "The applicability of permits to public and private dischargers does not inform us about whether a particular permit or an obligation thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6." This executive order is the only thing the Commission has jurisdiction over. Because it does not apply to private entities, the executive order does constitute a program under article XIII B, section 6.

Ms. Geanacou stated that Finance does not believe the opinion goes as far as the Commission staff is suggesting. The opinion is not suggesting that the Commission ignore the existence of similarly issued permits that may affect private dischargers.

Ms. Shelton responded that the court found that each permit was a stand-alone executive order. This permit applies only to local entities.

Ms. Geanacou stated that if requirements on local government are just contained in a test claim statute directed to a school district or a city or a county, but the same requirements apply to private industries, then the Commission must recognize the existence of other statutes that may similarly apply.

Mr. Hagerty explained that there is a very different regulatory structure applicable to municipalities. The permits are unique to municipalities and very specifically directed at the operations of municipalities.

Ms. Jennings stated that "municipalities" is defined to include state and federal agencies.

Mr. Hagerty stated that there is a different federal process. Phase II permitting is for different entities. This Phase I permit applies to cities and counties in San Diego County.

Ms. Shelton added that the activities in the conclusion are specifically mandating local entities, the county and the cities, to do a lot of collaboration between the regional, jurisdictional and the watershed areas. Those activities are imposed solely on government.

Ms. Shelton responded to the Water Board's argument about the permit not being unique to local government as opposed to state and federal government, stating that the courts have said it does not matter if it is imposed on local government versus state government, it is still governmental.

Chairperson Bryant asked, when determining which parts of the permit are reimbursable, if other permits could be compared. Ms. Shelton stated that other permits are not part of this record.

Mr. Feller indicated that there is a different standard for private dischargers under best available technology (BAT) instead of MEP and deferred to Ms. Jennings.

Ms. Jennings stated that the requirements for industrial and construction activities, with over half of those activities actually being conducted by government entities, are more stringent.

With a motion by Member Worthley and a second by Member Glaab, the staff recommendation was adopted by a vote of 6-1 with Chairperson Bryant voting no.

Item 6 Proposed Statement of Decision: *Discharge of Stormwater Runoff, Order No. R9-2007-000,* 07-TC-09
[See Item 5 above.]

Member Olsen made a motion to adopt the proposed Statement of Decision. With a second by Member Glaab, the Statement of Decision was adopted 6-0 with Chairperson Bryant abstaining.

Member Cox exited the meeting room.

Item 7 *Airport Land Use Commission/Plans II*, 03-TC-12 and 08-TC-05
Public Utilities Code Sections 21670, 21671.5, 21675, and 21676; Statutes 1967, Chapter 852 (SB 256); Statutes 1970, Chapter 1182 (AB 1856); Statutes 1972, Chapter 419 (AB 677); Statutes 1973, Chapter 844 (AB 2207); Statutes 1980, Chapter 725 (SB 1381); Statutes 1981, Chapter 714 (SB 1192); Statutes 1982, Chapter 1047 (AB 2525); Statutes 1984, Chapter 1117 (AB 3551); Statutes 1987, Chapter 1018 (SB 633); Statutes 1989, Chapter 306 (SB 253); Statutes 1990, Chapter 563 (AB 4265); Statutes 1990, Chapter 1572 (); Statutes 1991, Chapter 140 (SB 532); Statutes 1993, Chapter 59 (SB 443); Statutes 1994, Chapter 644 (AB 2831); Statutes 2000, Chapter 506 (SB 1350); Statutes 2002, Chapter 438 (AB 3026); and Statutes 2002, Chapter 971 (SB 1468);
Public Resources Code Section 21080,
Statutes 1983, Chapter 872 (AB 713); Statutes 1985, Chapter 392 (AB 43); Statutes 1993, Chapter 1131 (SB 919); Statutes 1994, Chapter 1230 (SB 749); Statutes 1996, Chapter 547 (AB 298)
County of Santa Clara, Claimant

Commission Counsel Heather Halsey presented this item. Ms. Halsey stated that this test claim addresses airport land use commissions (ALUCs) and airport land use compatibility plans. Generally, each ALUC prepares an airport land use compatibility plan focused on broadly defined noise and safety impacts.

The claimant alleges the following activities are required by the test claim statutes: review and revise airport land use commission plans, which include CEQA compliance; review and act on referrals; and provide staff assistance and other resources.

Ms. Halsey explained that the activities required of ALUCs have increased since 1975, thus indirectly increasing the cost that counties are required to incur pursuant to Public Utilities Code section 21671.5. However, there has been no shift in fiscal responsibility from the state to the counties. Rather, there has been an increase in activities required of ALUCs and a commensurate expansion of the ALUC fee authority sufficient to cover the costs of the ALUC activities.

To the extent the ALUC decides not to fully exercise that fee authority; it shifts the costs to the county. Therefore, the primary holding in *City of San Jose* is directly on point, that nothing in article XIII B prohibits the shifting of costs between local government entities. Staff recommended that the Commission adopt this staff analysis to deny the test claim.

The parties were represented as follows: Lizanne Reynolds representing the County of Santa Clara; Donna Ferebee and Carla Shelton representing the Department of Finance.

Ms. Reynolds stated that the Commission previously determined, under CSM-4507, that the requirement for counties to establish ALUCs is a reimbursable mandate. The key issue in this

test claim is whether additional duties that the Legislature imposes on ALUCs thereby impose additional duties on counties. This relationship between ALUCs and their counties stems from Public Utilities Code section 21671.5 (c), which requires a county to provide ALUCs with staff assistance, and also states that the usual and necessary operating expenses of the commission shall be a county charge.

Ms. Reynolds disagreed that this is, as the staff analysis asserts, a cost-shifting. Both of these duties were imposed on ALUCs and on counties by the Legislature. So, every time the Legislature increases duties on ALUCs, it automatically imposes additional responsibilities on counties to support those activities.

She explained that the commissions are volunteer and deal with land use planning activities similar to those of cities and counties. They do need professional staff assistance to help develop their plans and to review the referrals they receive from other land use jurisdictions.

Ms. Reynolds disagreed with staff that the only thing the statute requires or deems reasonable as staff assistance or usual and necessary operating expense of an ALUC is clerical or administrative support. It is not feasible for airport land use commissioners to perform their duties without some level of professional assistance.

Ms. Reynolds stated that the Santa Clara County ALUC did adopt some fees for the first time in 2004. Those fees, however, apply to referrals, and not to the actual establishment and development of the comprehensive land use plan. This is not a situation where the Legislature took an activity that was mandated for one local agency and shifted it over to a different local agency. These activities flow from new mandates that were imposed by the state on ALUCs after 1975, which then flow through to counties due to their responsibility to provide staff assistance and cover the usual and necessary operating expenses of ALUCs.

Carla Shelton stated the Department of Finance agrees with the staff analysis.

Member Worthley pointed out that even if an entity has fee authority, it may not have anybody to charge. In this case, the obligation is put upon the smaller entity, but the smaller entity has no way to capture the funds to pay for the plan except through the county. So the county is, by default, required then to put up the money.

Ms. Reynolds stated that, even though the ALUC adopted fees for project referral, those referrals come from other local agencies, the cities, and there is trouble collecting the fees.

Member Worthley stated that creating a plan is different from dealing with referrals when it comes to collecting fees.

Member Glaab asked if staff had a chance to review the letter dated March 25, 2010 from the Santa Clara County Office of County Counsel. Ms. Halsey stated that she first saw the letter this morning. She has only skimmed it but has not read it closely.

Donna Ferebee, Department of Finance, on the issue of whether an ALUC can or cannot charge a fee, pointed to a citation of the Santa Clara County Board of Supervisors where it sounds as though there was a policy decision made not to charge a fee to avoid deterring jurisdictions from referring projects and thus diminishing appropriate land use planning around the county's airports.

Ms. Halsey stated that they did impose a substantial fee but not to fully recover their costs.

Ms. Reynolds clarified that that was a board of supervisors' review of an ALUC fee adoption. But the County's ALUC takes the position that based on state law; the ALUC is the one with fee adoption authority, not the board of supervisors.

Member Worthley stated that it is not uncommon that fees are not fully recovered and that would not be a basis for making a claim against the state for a mandate.

With a motion by Member Chivaro and a second by Member Olsen, the staff recommendation was adopted by a vote of 4-2 with Members Glaab and Worthley voting no.

Item 8 Proposed Statement of Decision: *Airport Land Use Commission/Plans II*, 03-TC-12 and 08-TC-05
[See Item 7 above.]

Member Worthley made a motion to adopt the proposed Statement of Decision. With a second by Member Chivaro, the Statement of Decision was adopted by a vote of 6-0.

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

PROPOSED AMENDMENTS TO PARAMETERS AND GUIDELINES DIRECTED BY THE LEGISLATURE

Item 10 *Mandate Reimbursement Process*, CSM-4204 and 4485
Statutes 1975, Chapter 486; Statutes 1984, Chapter 1459; Statutes 1995, Chapter 303 (Budget Act of 1995); Statutes 1996, Chapter 162 (Budget Act of 1996); Statutes 1997, Chapter 282 (Budget Act of 1997); Statutes 1998, Chapter 324 (Budget Act of 1998); Statutes 1999, Chapter 50 (Budget Act of 1999); Statutes 2000, Chapter 52 (Budget Act of 2000); Statutes 2001, Chapter 106 (Budget Act of 2001); Statutes 2002, Chapter 379 (Budget Act of 2002); Statutes 2003, Chapter 157 (Budget Act of 2003); Statutes 2004, Chapter 208 (Budget Act of 2004); Statutes 2005, Chapter 38 (Budget Act of 2005); Statutes 2006, Chapter 47 (Budget Act of 2006); Statutes 2007, Chapter 171 (Budget Act of 2007); Statutes 2008, Chapter 268 (Budget Act of 2008); Statutes 2009-2010, Third Extraordinary Session, Chapter 1 (Budget Act of 2009)

Assistant Executive Director Nancy Patton presented this item. From 1995 through 2009, the State Budget Acts have required the Commission to amend the *Mandate Reimbursement Process* parameters and guidelines to limit state reimbursement of local government costs for independent contractors used to prepare and submit reimbursement claims.

Until 2006, the Commission made this amendment each year on a proposed consent calendar. Since 2006, the Commission has not adopted the amendment because the *Mandate Reimbursement Process* program was set aside.

The program has been reinstated. Therefore, staff is again proposing the independent contractor language be inserted in the parameters and guidelines. The proposal also adds standard language that clarifies there shall be no reimbursement for any period in which the Legislature has suspended the mandate. The League of California Cities (League) and California State Association of Counties (CSAC) are opposed to the proposed language regarding suspensions. Staff disagrees with the League and CSAC and recommends the Commission adopt the proposed language, including the suspension language.

The parties were represented as follows: Allan Burdick representing the League and CSAC; Ginny Brummels representing the State Controller's Office and Lorena Romero and Donna Ferebee representing the Department of Finance.

Mr. Burdick stated that the number 1 issue of *Mandate Reimbursement Process* is "Can you suspend a mandate which does not exist?" While that decision was being litigated, the State budget continued to suspend the mandate. Mr. Burdick pointed out that in order to suspend a mandate, there has to be a mandate in the first place, and this mandate had been set aside. He asked "how can you suspend a mandate that's not there?" The second key issue, from the League and CSAC point of view, is whether you can suspend *Mandate Reimbursement Process* itself at all?

Ms. Shelton stated that the suspensions were enacted as part of the Budget Acts and they are separate statutes. The Commission does not have jurisdiction to decide whether those statutes are unconstitutional or invalid.

Ms. Brummels stated that the State Controller's Office supports the staff analysis. Ms. Romero stated that the Department of Finance supports the staff analysis.

Ms. Romero added that the process by which the suspensions were done for the *Mandate Reimbursement Process* program is no different from any other test claim. It is looked at in the whole to determine when the suspension of funds will be done.

Mr. Burdick stated that there is a difference. For example, the Legislature has actually changed statutes on other test claims. However, there is no place to change statutes on the Mandate Reimbursement Process.

Ms. Shelton stated that these issues have come before the Commission in *Carmel Valley II* where they were alleging the statutes were unconstitutional. The court said that they must exhaust all administrative remedies with the Commission even though the Commission has no jurisdiction to decide whether or not a statute is unconstitutional. The issues raised by Mr. Burdick are constitutional issues challenging those State Budget Acts and the Commission simply does not have jurisdiction to make those decisions.

With a motion by Member Olsen and a second by Member Chivaro, the recommendation to adopt the staff analysis was approved by a vote of 4-2 with Members Worthley and Glaab voting no.

Mr. Burdick asked if this technical amendment will still require the State Controller to issue claiming instructions. Ms. Higashi stated that when the Commission has adopted this language in the past, the State Controller's Office has issued claiming instructions.

STAFF REPORTS

Item 13 Update on Implementation of Recommendations from Bureau of State Audits October 15, 2009 Report 2009-501

Ms. Patton presented this item. In October 2009, the Bureau of State Audits (BSA) released its follow-up audit report on the mandate process. The State Auditor requires the Commission to reply to the final audit report within 60 days, six months and one year of the report's issue date regarding the implementation of their proposed recommendations. On October 30, 2009, the Commission adopted and submitted a work plan to implement the BSA recommendations.

Ms. Patton indicated that the six-month report is now due. Staff has updated the work plan to reflect the actions completed since the 60-day report, including:

- Beginning work on incorrect reduction claims (IRC) by issuing a draft staff analysis and setting hearings for the *Investment Reports* IRC for Los Angeles County.
- Developing amendments to the Commission regulations.

- Completing an additional 41 boilerplate requests for parameters and guidelines amendments.
- Legislative Subcommittee conducted a meeting on proposed language for requesting adoption of a new test claim decision.

Staff recommends that the Commission approve the updated work plan for implementing the BSA recommendations.

With a motion by Member Worthley and a second by Member Chivaro, the updated work plan was approved by a vote of 6-0.

Item 14 Legislative Update

Ms. Patton presented this item. Two bills, AB 548 which would have revised the State Controller's audit period, and AB 917 regarding suspension of school mandates, have died.

SB 894, which contains our proposed modifications to our reports to the Legislature, is set for hearing in Senate Local Government on April 21, 2010. AB 2082, a new bill that staff is tracking, would expand the Legislative Analyst's Office current reporting requirements on mandates to require them to annually report on each education mandate that has not been funded.

On March 25, 2010, the Commission's Legislative Subcommittee conducted a workshop to discuss the proposed language on requesting adoption of a new test claim decision, formerly known as the reconsideration process. Member Olsen and Member Glaab will report on that workshop.

Member Olsen reported that the workshop was well attended by interested parties. Commission staff presented new draft language. Two primary issues were addressed in that language. The first issue was how to define this new process since interested parties had substantial concerns about naming it a 'reconsideration process' when there already is a 'reconsideration process' in place. Therefore, staff will further define the process.

The second issue was that, in this draft, the statute of limitations has been removed. As the process moves forward, the language will be updated and available. The language is not placed in legislation yet, but it could be placed in a budget trailer bill.

Member Glaab stated that there is concern over the unintended consequences of implementing such a policy. Therefore staff will continue to work to consider all of the concerns that were issued at the workshop.

Mr. Burdick stated that this proposal could have serious and significant impacts on the Commission and its decisions as well as on local government. Mr. Burdick expressed his desire to have this process go through a normal legislative process rather than a trailer bill to allow for participation from all parties.

Member Olsen agreed, and assured Mr. Burdick that the Commission wants to pursue the whole policy and fiscal evaluation but does not want other parties drafting the language that affects this process. Therefore, the Commission is moving on a staff and interested-party level before it becomes an official part of any process.

Mr. Burdick questioned the appropriateness of letting the Legislature and Governor know of the potential impact on this process which will take very careful deliberation.

Ms. Higashi stated that there is no action scheduled for this agenda and suggested conveying a message to the budget committee staff that a working group involving all parties be convened to go over it before anything is put into print.

Item 15 Chief Legal Counsel's Report (info)

Ms. Shelton reported another case of interest, *the California School Boards Association* v. *the State of California*. The Commission is not a party to this case. CSBA is challenging the state's practice of deferring mandate reimbursement for school districts. This case is pending in the 4th District Court of Appeal and briefing is underway.

Item 16 Executive Director's Report (info)

Ms. Higashi stated that there are action items within this report. The first concerns a response to Senate Budget Subcommittee No. 4. All the state agencies that are subject to Budget Subcommittee No. 4 were asked to provide a mission statement, a strategic plan, a summary of our enabling legislation, a brief summary of who we serve and how many we serve, and a description of measurements and outcomes that we use to define success for each of our major programs.

Ms. Higashi indicated that all of the information requested is readily available, either from the Executive Director's monthly reports or from reports to the Legislature. However, the strategic plan is something that none of the sitting members of the Commission have ever approved. Therefore, Ms. Higashi recommends adopting and submitting an interim strategic plan. She further recommends that the interim strategic plan be sent to parties, posted on the Commission's website. Staff will also solicit public comments, provide staff comments and work this into a more formal strategic plan. Then, the Commission can adopt a final strategic plan at the May 27, 2010 hearing.

With a motion by Member Lujano and a second by Member Chivaro, the staff recommendation was approved by a vote of 6-0.

Ms. Higashi presented the 2010 meeting and hearing calendar and stated that, during Anne Sheehan's tenure, the Commission started meeting on Fridays instead of Thursdays. The May hearing is scheduled for a Thursday because that was the date that was most convenient for all the Commission members. Staff would recommend going back to a Thursday calendar and those tentative dates are presented for consideration.

Member Worthley expressed a scheduling conflict with the CSAC board of directors meeting on Thursdays if the Commission were to change to Thursday hearings.

Member Glaab expressed the opposite scheduling conflict with the Metrolink board meetings being held on Fridays so Commission hearings on Thursdays work best.

Member Olsen and Chairperson Bryant expressed conflicts with the tentative date of Thursday, June 24, 2010.

Member Glaab asked about the feasibility of meeting on another day such as Wednesday.

Ms. Higashi stated that scheduling meeting rooms would be problematic. Ms. Higashi asked the members to submit their meeting calendars and definitive dates and stated that there are no plans for a June 2010 meeting unless there is new litigation. Ms. Higashi called for a vote on the May 27, 2010 hearing date.

With a motion by Member Olsen and a second by Chairperson Bryant, the hearing date of May 27, 2010 was approved by a vote of 6-0.

Ms. Higashi pointed out the section in the Executive Director's report titled "New Practices" which will be reserved for reporting and publicizing new efficiencies or recommendations from the BSA audit.

Ms. Higashi noted that the rulemaking workshop held on March 25, 2010 was well attended. The primary changes were bringing Commission regulations into the 21st century and adding and changing sections so that the Commission would have an e-filing and e-mailing system. It is substantial progress and a lot of the work has been done by staff. The actual proposal will come before the Commission to issue the notice of rulemaking at the May meeting.

Ms. Higashi noted the calendar's tentative agendas for the next couple of meetings as well as a copy of the Legislative Analyst's report with a special report focusing on mandates.

PUBLIC COMMENT

Ms. Patton asked Mr. Glen Everroad from the City of Newport Beach to come forward. Upon his retirement, Ms. Patton read a resolution from the Commission congratulating him for his many years of dedicated service.

Mr. Everroad thanked the Commission and said that it has been rewarding to spend half of his 34 years with the City of Newport Beach involved with the mandate process. Mr. Everroad recognized the professional process that has been developed and the Commission staff for the thorough and professional work.

Member Glaab commented that he and Mr. Everroad have been occasional seat mates on the airplane to Sacramento for over five years. Member Glaab stated that Mayor Curry of Newport Beach commended Mr. Everroad and valued him as a professional employee who will be missed.

CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 AND 11126.2 (action).

A. PENDING LITIGATION

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matters pursuant to Government Code section 11126, subdivision (e)(1):

State of California, Department of Finance v. Commission on State Mandates, et al., Sacramento Superior Court Case No. 03CS01432,
[Behavioral Intervention Plans]

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126, subdivision (e)(2):

Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members and/or staff (Gov. Code, § 11126, subd. (e)(2)(B)(i).)

B. PERSONNEL

To confer on personnel matters pursuant to Government Code sections 11126, subdivision (a)(1).

Hearing no further comments, Chairperson Bryant adjourned into closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation published in the notice and agenda; to confer and receive advice from legal counsel

regarding potential litigation; and also to confer on personnel matters and a report from the personnel subcommittee pursuant to Government Code section 11125, subdivision (a)(1).

REPORT FROM CLOSED EXECUTIVE SESSION

At 11:55 a.m., Chairperson Bryant reconvened in open session, and reported that the Commission met in closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the public notice and agenda, and potential litigation, and also to confer on personnel matters listed on the published notice and agenda pursuant to Government Code section 11126, subdivision (a)(1).

Item 17 Salary Adjustment: Attorney to the Commission/Chief Legal Counsel (CEA IV), pursuant to Government Code Section 17529

Member Lujano, Personnel Subcommittee, stated that the chief legal counsel is at the CEA IV pay level and received a pay increase two years ago. The chief legal counsel has not reached the top of her pay scale. Based on her excellent work performance and duties and the fact that the Commission's budget can absorb this salary adjustment, the Personnel Subcommittee is recommending increasing the salary of the chief legal counsel by five percent.

With a motion by Member Chivaro and a second by Member Olsen, the Personnel Subcommittee recommendation to adjust the chief legal counsel's salary by five percent, effective April 1, 2010, was approved by a vote of 6-0.

ADJOURNMENT

Hearing no further business, Chairperson Bryant adjourned the meeting at 12:00 p.m.

Paula Higashi

PAULA HIGASHI
Executive Director